TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-518

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Writ of Certiorari to The Supreme Court of Oregon

BRIEF OF NATIONAL AUDUBON SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS

National Audubon Society is a national conservation organization with approximately 550,000 members across the country. The Society is interested in the preservation of a balanced understanding of property rights, which recognizes not only that certain regulations can effect a taking but also that our elected representatives have broad constitutional authority to adopt reasonable regulations to protect and enhance private and public resources.

STATEMENT OF THE CASE

Amicus curiae National Audubon Society adopts respondent City of Tigard's statement of the case.

SUMMARY OF ARGUMENT

Nollan v. California Coastal Commission, 483 U.S. 825 (1987), held that a dedication condition must be "reasonably related" to the public need or burden resulting from development. Petitioner and some *amici* contend that *Nollan* established much more. That contention is based on a misreading of *Nollan* which the Court should decline to accept in this case. The dedication conditions at issue is this case are entirely consistent with the holding of *Nollan*.

Nollan does not hold that a dedication condition can be upheld under the takings clause only if (1) public authorities could have prohibited the development without compensation, and (2) the dedication condition serves the same purpose as would prohibition. *Nollan* establishes that satisfaction of these two requirements constitutes a defense to a takings challenge to a dedication condition.

Similarly, *Nollan* does not hold that a dedication condition must "substantially advance a legitimate state interest" to avoid a successful takings challenge. Because the decision turned on application of a "reasonable relationship" test, the language in *Nollan* supportive of this more exacting substantial relationship test is *dicta*. The Court has *never* relied on a "substantial relationship" standard, either in *Nollan* or in any prior case, to find that a regulatory action effected a taking. At bottom, this type of means-ends

analysis is based on the requirements of the due process clause, not the takings clause. Incorporation of substantive due process into the takings clause would subject local land use regulations to intrusive and uncertain federal court supervision in violation of fundamental constitutional traditions, frustrate the efforts of democratically-elected officials to cope with serious environmental and transportation problems, and condemn takings law to deepened confusion and increased litigation.

We respectfully suggest that the Court take the opportunity presented by this case to sort out confusion about the relationship between the due process and takings clauses in the context of regulation of land use. Once the *Nollan* decision is reexamined in light of the distinct analytic approaches and remedies appropriate to each clause, *Nollan* is best understood as a decision resting on the due process rather than the takings clause.

ARGUMENT

The issue in this case is whether a local government may approve a development project on the condition that the owner dedicate a fraction of her property to the public, where such a requirement mitigates public and private harms the development would otherwise cause and confers significant benefits on the owner. Petitioner and *amici* contend that under *Nollan* the dedication conditions at issue in this case are invalid. In fact, the dedication conditions in this case are entirely consistent with *Nollan*. Petitioner's and *amici*'s arguments to the contrary are based on a misreading of *Nollan*.

I. *Nollan* Establishes a Two-Part Defense to a Takings Challenge to a Dedication Condition.

In *Nollan*, the Court held that the condition at issue in that case was invalid because it was not "reasonably related to the public need or burden that the Nollans' new house creates or to which it contributes." 483 U.S. at 838. The Court concluded that the condition requiring lateral public access along the beach did not meet this standard because the condition was completely unrelated to the California Coastal Commission's goal of preserving visual access to the beach. No one contends that the City of Tigard's dedication conditions lack a reasonable relationship to identifiable development harms. Accordingly, the holding of *Nollan* supports the City.

Petitioner and some *amici* contend that *Nollan* established a second, two-part test for determining whether a dedication condition effects a taking. They contend that a dedication condition effects a taking unless (1) the public could have prohibited the claimant from pursuing his development project, and (2) the condition serves the same purpose that would be served by prohibition. *See* Brief for Petitioner, at 22. *See also, e.g.,* Amicus Curiae Brief of Northwest Legal Foundation, at 5. In fact, *Nollan* establishes no such test. *Nollan* merely identifies a potential defense to a takings claim: if both requirements are met, a takings claim fails.

This reading of *Nollan* is supported by several aspects of the decision. First, the Court's discussion of this potential defense to a takings claim responded to the Coastal Commission's argument that "a permit condition that serves the same legitimate police-power

purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." 483 U.S. at 836. The Court agreed with that proposition. However, "[t]he evident constitutional propriety disappears," the Court continued, "if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." *Id.* at 837. Fairly read, this portion of the opinion only states that a takings challenge to a dedication condition can be defeated by demonstrating that both of these requirements are satisfied. That legal conclusion is a far cry from the proposition advanced by petitioner that failure to satisfy either requirement conclusively demonstrates that a taking has occurred. *Nollan*, of course, did not so hold.

Second, once it rejected the Commission's argument that its dedication condition satisfied this defense, the Court proceeded to examine whether the beach access condition was reasonably related to the public needs and burden created by the Nollans' development. All of section III of the *Nollan* opinion would have been unnecessary if, as petitioner contends, a dedication condition that failed to satisfy the two requirements were automatically a taking. The fact that the Court proceeded to an examination of the condition's actual relationship to the development confirms that the Court did not believe it was announcing a new, independent test for determining whether or not a dedication condition effects a taking.

Apart from the logic and language of *Nollan* itself, the Court should reject petitioner's proposed two-part test because it violates simple common sense and is

contrary to the Court's established reading of the takings clause.

Viewed only as a defense to a takings challenge, petitioner's formulation is unobjectionable. If the public could prohibit a property owner from using her property altogether without effecting a taking, it is indeed difficult to see how allowing some development to proceed, even on the condition that the owner dedicate some portion of her property to the public, could be considered a taking, at least when the condition and the prohibition serve the same end. The authority to impose some greater restriction on the use of property for a valid public reason necessarily implies the authority to impose some lesser restriction on the property to achieve the same end.[1]

On the other hand, adopting petitioner's proposed test would create a nonsensical standard for determining whether a dedication condition actually effects a taking. First, the proposed test focuses on the wrong issue. In asking whether public officials could have validly rejected the development, the test poses a hypothetical inquiry of no actual relevance to the case. A takings challenge to a dedication condition

[1] The Court hypothesized in *Nollan*, 483 U.S. at 837, that California could not defend charging a $100 fee for shouting "fire" in a crowded theater on the theory that the State has the greater power to prohibit shouting altogether. In that hypothetical, the State's power to prohibit the activity cannot justify imposition of the condition because the condition is unrelated to the purpose of the prohibition. On the other hand, though the example is obviously fanciful, there would be no constitutional problem if the State allowed people to shout "fire" on the condition that they promptly and at equal volume shout "just kidding"; in this hypothetical the condition serves the same purpose as the prohibition.

only arises when the community has allowed the development to go forward.

Second, petitioner's proposed test would require the public to defend every type of dedication condition by justifying the even greater interference of a complete prohibition against use of the property. Ironically, this mode of analysis would invite greater, unnecessary intrusions on private property interests than the government actually intends.

Finally, the proposed test would produce inequitable results in practice. It would be manifestly unfair, for example, if a few of those developers subject to the dedication requirement could exempt themselves, even though their development contributed as much or more as any other to the problem being addressed, simply because the government lacked the theoretical (but unexercised) authority to prohibit their particular development.[2]

There is no discernible rationale based on the Court's prior decisions interpreting the takings clause for petitioner's novel two-part test. Petitioner contends (Brief at 22) that her proposed test is "consistent" with the "basic premise" that the "right of use" is an "essential attribute" of property ownership

[2] The perversity of petitioner's proposed test is apparent when considered in light of the common requirement that the developer of a residential subdivision dedicate land for internal public streets. Petitioner apparently would permit such conditions only in the odd case case where the locality could prohibit subdivision of the site entirely. But state and federal courts routinely uphold such conditions on the sound bases that the conditions have a "rational nexus" to costs generated by the new development. *See generally* D. Hagman & J. Juergensmeyer, *Urban Planning and Land Development Control Law* 202-212 (1986).

and, therefore, public approval of a development proposal cannot be considered a "benefit. . . that would justify government demanding a *quid pro quo* for permit approval."

The short answer to this contention is that, while the Court has recognized that the Constitution protects "property rights," *see, e.g., United States v. James Daniel Good Real Property*, 114 S.Ct. 492, 505 (1993), the Court has never recognized a general "right to use property." Unlike the First Amendment, for example, which explicitly recognizes "freedom of speech" and "the right of the people peaceably to assemble." the takings clause creates only a negative right not to be subjected to an uncompensated taking of one's property for public use. Property rights themselves are created and defined by State law, not by the Constitution. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). The Court has frequently upheld costly restrictions on land use because of its recognition that government must act to prevent harm to public health and safety and because land use regulation according to a comprehensive plan enhances the economic and social value of the community's land in the aggregate.[3]

Some commentators have defended petitioner's proposed reading of *Nollan* as an application of what they term the "doctrine of unconstitutional condi-

[3] In *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), involving a prohibition on land use that made the property "valueless," the Court did not conclude that the regulation necessarily effected a taking, recognizing that even so onerous a regulation could be defended if it were consistent with background principles of state nuisance or property law or necessary to guard against a "grave threat" to life or property.

tions."[4] This doctrine, which probably does not exist, ostensibly holds that the government may not grant a benefit on the condition that the beneficiary cede a constitutional right. However, the requirement of the petitioner's test that the condition serve the same purpose as prohibition cannot be reconciled with this doctrine. Moreover, because *Nollan* expressly acknowledges that certain regulatory decisions involving dedication conditions do not effect a taking, *Nollan* itself refutes the notion that the doctrine of unconstitutional conditions can be mechanically applied to determine whether a dedication condition effects a taking.

This doctrine is inapposite in takings cases because of the distinctive character of takings doctrine. As the Court stated in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987), the takings clause "is designed not to limit governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." Consistent with this understanding of the function of the takings clause, courts have frequently held that dedication conditions, viewed in the context of the larger regulatory decisions of which they are a part, are entirely consistent with the Fifth Amendment.

In many cases, dedication conditions, such as those for sidewalks, applied broadly to all or some portion of a community, create reciprocal benefits for the

[4] *See, e.g.*, Epstein *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 5, 60-64 (1988).

property owner. In this regard, dedication conditions are similar to regulatory restrictions, such as zoning laws, which have long been upheld against takings challenges on the ground that they confer compensating benefits to the owner. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 (1987) (referring to the "average reciprocity of advantage that has been recognized as a justification of various laws"). Dedication conditions also are similar to user fees, the constitutionality of which has generally been upheld so long as the fees represent a "fair approximation"of benefit to the user. *See United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989).

In other cases, a dedication condition, much like a use restriction, serves to control and or mitigate public and private harms that would otherwise result from the development and which the public has broad authority to control. *See Keystone*, 480 U.S. at 492 ("no individual has a right to use his property so as to create a nuisance or otherwise harm others"); *see also Lucas*, 112 S.Ct. at 2901 (a regulation that denies an owner all economic use can be justified based on, among other things, "the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities"); *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part) ("regulations requiring subdividers to observe lot-size and setback restrictions, and to dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed use would otherwise be the cause of excessive congestion").[5]

[5] Examination of a dedication condition in the context of the entire regulatory decision of which it is a part comports with the principle that takings challenges must be considered in relation to the "parcel as a whole." *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). In *Concrete Pipe & Products v. Construction Laborers Pension Fund*, 113 S. Ct. 2264, 2290 (1993), the Court rejected a claimant's effort to artificially segment the property, stating that "we rejected this analysis years ago" in *Penn Central*, where "we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question." Petitioner's proposed test, by focusing on the condition, and asking only whether the purpose served by the condition would have justified outright prohibition of the development, is inconsistent with the "parcel as a whole" rule.

In short, dedication conditions are a legitimate method of land use regulation. No novel constitutional doctrine bars their employment. We turn now to evaluation of dedication conditions under traditional constitutional principles.

II. A Violation of the Due Process Clause Does Not Automatically Demonstrate a Constitutional Taking Requiring the Payment of Just Compensation.

Petitioner also seeks to rely on *Nollan* for the proposition that the conditions imposed by the City of Tigard effect a taking if they fail to "substantially advance a legitimate state interest." *See* Brief of Petitioner, at 20. While *Nollan* does contain this phrase, the decision held only that the beach access condition failed a reasonable relationship test. Other takings decisions of the Court also recite this phrase, but they do not explore what, if any, additional ob-

ligations the phrase might impose on local governments.

The relationship between legislative means and ends is, at bottom, a due process issue, not a takings issue. The Court should resolve the confusion over the relationship between the due process and takings clauses exacerbated by *Nollan* and some of the Court's other opinions. The Court should explicitly recognize that means-ends analysis has no place in takings doctrine.

A. No Precedent Definitively Supports Including A Means-Ends Test in Takings Law, Much Less Heightened Scrutiny of Means and Ends.

Despite the statement in *Nollan* that it is "well-established," 483 U.S. at 834, no decision of the Court definitively supports the idea that a regulation effects a taking if it fails to "substantially advance" a legitimate state interest. The Court has never relied on this standard to hold that a regulation effected a taking. Moreover, the Court has never examined in any detail why a means-ends analysis might provide a meaningful test for identifying a taking requiring the payment of just compensation.[6]

---

[6] Members of the Court have touched upon the relationship between the due process and takings clauses in considering whether a regulatory action can effect a taking at all or whether instead burdensome regulation only violates the due process clause. Justice Brennan, in a dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 646-47 (1981), raised the question "whether a government entity's exercise of its regulatory police power can ever effect a 'taking' within the meaning of the Just Compensation Clause." Justice Brennan answered his own question by stating that, at least when a regulation eliminates all economic use of property, it can effect a taking. In the process, Justice Brennan rejected Judge Breitel's view that onerous regulations raise only a due process issue, not a takings issue. *See Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 384-85 (N.Y.), *cert. denied*, 429 U.S. 990 (1976) (Breitel, C.J.) ("In all but exceptional cases,. . . [an onerous] regulation does not constitute a 'taking,' and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid."). Surprisingly, no subsequent opinion for the Court has squarely addressed the specific question raised by Justice Brennan, though it was clear by the mid 1980's that several Justices accepted Justice Brennan's view that regulation can effect a taking, at least when it eliminates all economic value. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 361-62 (1986) (White, J. dissenting). The Court's apparent working assumption that at least some land use regulations can be challenged as either a taking or a due process violation obviously does not mean that takings doctrine incorporates a due process type of analysis.

In support of this test, *Nollan* cites only *Agins v. City of Tiburon*, 447 U.S, 255, 260 (1980), with a "see also" to *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978). *Agins*, a brief, unanimous decision *upholding* a zoning ordinance does indeed state that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests." 447 U.S. at 260. However, the only support the *Agins* Court cites for this proposition is *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), a constitutional challenge to a zoning regulation, but one based on the due process clause and not the takings clause. There is no indication in *Agins* that the Court recognized that *Nectow* did not support the proposition for which it was cited, much less any analysis explaining why it might be appropriate to incorporate due process thinking into takings doctrine.

The citation in *Nollan* to *Penn Central* is similarly problematic. The *Penn Central* Court again cited *Nectow* and also asserted that a means-ends inquiry under the takings clause is "implicit" in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). *Goldblatt*, however, involved a due process challenge to a land use regulation, as well as a takings claim. The Court addressed these claims separately, and discussed legislative means and ends solely in the context of the due process claim. As in *Agins*, the Court in *Penn Central* did not explain why a means-ends test should be incorporated into takings doctrine.[7]

Petitioner's reading of *Nollan* to suggest the takings clause includes not only some type of means-ends analysis, but requires even stricter scrutiny of means and ends than the due process clause itself, has *no* support in precedent. Certainly *Nollan* itself does not require this higher level of scrutiny, because the Court struck down the beach access condition relying on a reasonable relationship test. Moreover, just last year in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Fund*

[7] The *Penn Central* decision also contains a "cf." citation to Justice Stevens' concurring opinion in *Moore v. City of East Cleveland*, 431 U.S. 494, 514 (1977), in which he describes the Court's early zoning decision in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), as having "fused the two express constitutional restrictions on any state interference with private property—that property shall not be taken without due process of law nor for a public purpose without just compensation—into a single standard." That description is debatable because *Euclid* only involved a challenge under the due process and equal protection clauses. In any event, in the intervening fifteen years, the Court has not embraced Justice Stevens' theory and the *First English* decision in 1987 reinforced the distinctions between takings and due process violations. *See* p.20, *infra*.

for Southern California, 113 S. Ct. 2264, 2289 (1993), a case involving both due process and takings challenges to a federal statute modifying employers' pension liabilities, a unanimous Court stated that, if a regulation satisfied the due process clause, "it would be surprising indeed to discover the challenged statute nonetheless violates the Takings Clause." *See also Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986).

Footnote 3 of *Nollan* states that the Court's precedents "do not establish that these [means-ends] standards [as applied to just compensation claims] are the same as those applied to due process or equal protection claims." "To the contrary," the footnote continues, "our verbal formulations in the takings field have generally been quite different," citing *Agins v. Tiburon*, 447 U.S. 255, 260. It concludes with the statement that "there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges [and] due process challenges. . . are identical. . . ."

There are several serious flaws in this reasoning. Because there is no solid precedent for the idea that takings doctrine includes *any* means-ends test, it is hardly surprising that the Court's precedents "do not establish" that the means-ends test under the due process and takings clauses are the same. The statement that there "is no reason to believe" the standards are the same hardly provides a justification for believing the standards would be different. Furthermore, the decision in *Agins*, the lone precedent cited in footnote 3 of *Nollan*, actually contradicts rather than supports the notion that the takings clause re-

quires stricter scrutiny. *Agins* relies upon *Nectow*, which is itself a due process case. This chain of citation suggests that, to the extent the takings clause might incorporate means-ends analysis at all, the standards under the due process and the takings clause should be identical.[8]

It has been nearly sixty years since the Court abandoned reviewing the wisdom of economic regulations under substantive due process. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). That important step rested on the realization that democratically elected officials have the constitutional authority to adjust the benefits and burdens of economic life even when such decisions cause losses to owners of business capital. The Court should not stumble into that thicket again via a different path by allowing the takings clause to expand to include a strict means-ends test for review of regulations effecting the use of commercial property. Petitioner's reading of *Nollan* points in that direction and should be rejected.

B. Strong Legal, Policy, and Doctrinal Reasons Militate Against Including Means-Ends Analysis in Takings Law.

In addition to the lack of precedent for the idea that the takings clause requires a means-ends analysis, important legal and policy considerations, and the Court's obligation to maintain coherent legal doctrine, argue strongly against including a means-ends test in takings law.

---

[8] While *Nectow* sets forth a relatively rigorous means-ends test compared to the Court's modern formulations under the due process clause, that difference simply reflects the historical evolution in the Court's due process jurisprudence over the last 65 years.

Adoption of petitioner's proposed test would allow litigants to recast garden variety due process claims as takings claims, simply by describing as a taking a regulatory imposition that would traditionally be perceived as raising a due process issue. And litigants and their counsel would have a substantial incentive to do so, of course, because the takings clause provides monetary, not injunctive relief. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 311-12 (1987). The tendency would be even stronger if the takings clause were read to include not merely a reasonable relationship test but a "substantial" relationship test. The transmutation of due process claims into takings claims would subject federal, state, and local governments to enormously expanded liability and precipitate a substantial increase in the volume of litigation. *See* Epstein, *Takings Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 44 (arguing that *First English* and *Nollan* "increase the rate of return from" litigation and "it will now pay" to challenge "many" decisions that previously did not give rise to litigation).

These substantial costs could, of course, be justified if protection of constitutional property rights required it. It does not.

At its core, the takings doctrine is concerned with government assertion of the power of eminent domain—the involuntary appropriation of land or other property for the construction of public facilities and for other broadly defined public purposes. Takings in this core sense involve a deliberate, unilateral government decision to purchase property in exchange

for just compensation. The drafters of the Bill of Rights apparently intended the takings clause to apply primarily if not exclusively to this form of deliberate government appropriation,[9] a fact acknowledged by the Court in *Lucas*, 112 S. Ct. at 2900 n.15 ("[E]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all."). Nonetheless, the Court, beginning with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), has read the takings clause to extend to some regulatory actions.

Even with this step, however, the touchstone of the Court's takings decisions has centered on analogies to exercises of the power of eminent domain. As Justice Brennan stated, "police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property." *San Diego Gas & Electric*, 450 U.S. at 652. Similarly, in *Lucas*, the Court ruled that a regulation which deprives the owner of "all economically beneficial or productive use of land" is a presumptive taking because, among other things, a "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." 112 S. Ct. at 2894. If the regulatory takings doctrine has any coherent focus, it must be on the burdensomeness of the regulation or condition on the property as whole, evaluated in light of the purposes it serves and the justified expectations of the owner.

---

[9] *See* Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *Yale L. J.* 694 (1985).

However, a means-ends inquiry would bring within the ambit of takings law a host of issues that are unrelated to the core concern of takings law. If, for example, the California Coastal Commission had granted the Nollans a development permit on the condition that the Nollans exclude mentally retarded children from their beach property, that legislative goal would clearly be illegitimate. *Compare City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). Similarly, if the Commission denied the Nollans a permit because their name began with "N," that regulation would be an irrational means of accomplishing the goal of beach access. Both of these restrictions plainly should be struck down as lacking a rational basis, whether under the due process or the equal protection clause. Just as plainly, however, they do not represent the kind of imposition on property ownership that constitutes a taking requiring the payment of just compensation.

A means-ends analysis also cannot be squared with the distinct character of traditional takings analysis. The Court's review of regulations under the takings clause assumes that the ends and methods the government has selected are valid, but asks whether the government must pay compensation as a result of its action. As the Court stated in *Mahon*, the takings analysis under the Fifth Amendment "presupposes that [property] is wanted for public use, but provides that it shall not be taken for such use without compensation." *See also First English*, 482 U.S. at 315 (the takings clause "is designed not to limit the governmental interference with property rights *per se* but rather to secure compensation in the event of otherwise proper interference amounting to a taking").

On the other hand, lack of a rational relation to a permissible purpose indicates not that the government must pay compensation, but rather that the government cannot take the action at all. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

These different analytic approaches under the due process and takings clauses are reflected in the different remedies under each clause. The traditional remedy for a violation of the due process clause is an injunction halting the unconstitutional government action. On the other hand, as the Court recently clarified in *First English*, "government action that works a taking of property rights necessarily implicates the constitutional obligation to pay compensation." 482 U.S. at 315. Thus, melding means-ends analysis into takings doctrine would also sow confusion as to the appropriate remedy in takings cases.

Properly understood, *Nollan* rests on due process grounds. The Court employed the analytic framework provided by the due process clause, not the takings clause. The Court concluded that the beach condition was an *invalid* means of achieving the Commission's purpose; the Court did not analyze the case, as would have been appropriate if the case had been decided under the takings clause, by asking whether the Commission must pay just compensation in order to impose a *valid* condition. Consistent with this understanding of *Nollan*, the Court struck down the condition; it did not direct the payment of just compensation, as would have been appropriate if the case had been decided under the takings clause.[10]

[10] While it is obviously unnecessary to resift the facts of *Nollan* in this case, one can certainly debate whether the Court properly applied its traditional due process standards in that case. *See Nollan*, 483 U.S. at 843 (Brennan, J., dissenting). In any event, if the claim in the present case were viewed as a due process claim, it would survive challenge under the standard articulated in *Nollan* because there is plainly a "reasonable relationship" between the impacts of the Dolan development and the conditions at issue.

The fact that the *Nollan* "reasonable relationship" standard is actually a due process test does not mean that petitioner cannot frame a coherent takings claim in this case. The basic analytic framework for evaluating that claim is provided by the three factors the Court has traditionally identified as having particular significance in the regulatory takings context: the character of the government action, its economic impact, and the owner's reasonable investment-backed expectations. Review of regulatory decisions involving dedication conditions differs from the Court's review of other regulatory actions in that the character of the government action should make the Court alert that a dedication condition may involve serious losses to the owner not adequately captured by any diminution in economic value. Dedication conditions attached to commercial real estate are obviously unlikely to impose such noneconomic losses on an owner. At the same time, the takings inquiry in this as in every other context remains fact-sensitive.[11] No hard and fast rule can properly distinguish between regulatory decisions that involve (sometimes trivial) dedication conditions and regulatory decisions imposing stringent use restrictions.

[11] Application of the *per se* test for physical occupations would plainly be inappropriate, as *Nollan* recognized, because the owner accepted the condition to pursue valuable development.

III. The City of Tigard's Regulatory Conditions Do Not Effect a Taking.

Applying the foregoing, the Court should conclude that the City of Tigard did not effect a taking. First, both flooding and traffic congestion concerns would have supported a decision to reject the Dolans' proposal to build a new store, for the reasons described by the City of Tigard in its brief. The floodplain and transportation corridor conditions serve the same objective as such a prohibition. Because satisfaction of these two requirements is sufficient to defeat a takings claim, the decision of the Supreme Court of Oregon should be upheld on this basis alone.

Second, even if this defense does not apply, the petitioner has failed to demonstrate a taking. Payment of compensation is not appropriate in light of the substantial reciprocal benefits the conditions confer on the Dolan property and the harm the planned development would otherwise impose on other private and public resources. While the character of the dedication counts against the City's decision, this factor has limited significance as applied to commercial property of the kind at issue in this case.[12] *Compare Lucas*, 112 S. Ct. at 2899 (commercial personal property entitled to no protection against use restrictions that eliminate all value). The other two relevant factors weigh heavily against a finding of a taking. The economic effect of this regulatory decision on petitioner is small. Because petitioner already is making a very substantial economic use of the property, and the conditions do not materially interfere with petitioner's plans for expansion of her business, the City's action does not impair any investment-backed expectations.

[12] In this regard, it is noteworthy that while one of petitioner's amici refers to the business at issue in this case as a "country store," it is actually one location in a medium-sized chain of plumbing supply stores across the Portland metropolitan area which, according to a recent Dun & Bradstreet report, employs about 140 employees and has annual sales of approximately $17,000,000.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Supreme Court of Oregon.

Respectfully submitted,

JOHN D. ECHEVERRIA*
NATIONAL AUDUBON SOCIETY
666 Pennsylvania Ave., S.E.
Washington, D.C. 20003
(202) 547-9009

J. PETER BYRNE
GEORGETOWN LAW CENTER
600 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 662-9066

*Counsel of Record

February 17, 1994